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10 Attorneys for KeyBank National Association

11  
12 IN THE UNITED STATES BANKRUPTCY COURT

13 FOR THE DISTRICT OF OREGON

14 In re:

15 Laura Lee Hagenauer,

16 Debtor.

Chapter 11

No. 14-63530-fra11

**KEYBANK'S MEMORANDUM IN  
SUPPORT OF JOINT MOTION TO SELL  
REAL PROPERTY**

19  
20 KEYBANK NATIONAL ASSOCIATION ("KeyBank"), a secured creditor and party  
21 in interest herein, by and through its undersigned attorneys of record, submits the following  
22 memorandum in support of the JOINT MOTION BY DEBTOR AND R AND R PROPERTY  
23 HOLDINGS, INC. TO: (A) APPROVE SALE OF PROPERTY FREE AND CLEAR OF  
24 LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS; (B) DEBTOR'S ENTRY INTO  
25 REAL PROPERTY LEASE; AND (C) COMPENSATION TO REAL ESTATE BROKER  
26 filed October 7, 2015 (dkt. #252) (the "Joint Motion").

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## I. BACKGROUND

1.1 KeyBank holds a first priority perfected lien on the real property located at 3071 Schmidt Lane, Hubbard, Oregon (the "Subject Property") pursuant to a Deed of Trust dated January 27, 2012, recorded January 27, 2012 in the real property records of Marion County, Oregon, at Reel 3352, Page 214 (the "Deed of Trust").

1.2 KeyBank's Deed of Trust on the Subject Property secures a loan in the original principal amount of \$1,600,000 (the "KeyBank Note").

1.3 The payoff amount of the KeyBank Note, as of October 7, 2015, is \$1,787,043.

1.4 The Subject Property is also encumbered by the following liens:

Marion County Tax Collector (real property taxes)	\$131,680
SBA (2 <sup>nd</sup> priority deed of trust)	\$860,448
Oregon Bus. Dev. Comm'n (3 <sup>rd</sup> priority deed of trust)	\$706,588
Cascadia Metals, Inc. (4 <sup>th</sup> priority deed of trust)	\$634,357
IRS (federal tax lien)	\$514,014

1.5 The Joint Motion seeks authority from the bankruptcy court to sell the Subject Property, free and clear of liens, to R & R Holdings, Inc. (the "Buyer"), an affiliate of Cascadia Metals, Inc., for a gross sale price of \$2,600,000.

1.6 KeyBank consents to the sale, provided the KeyBank Note, including all principal, accrued interest, attorneys' fees and other charges allowed under § 506(b) of the Bankruptcy Code, the KeyBank Note, and Deed of Trust are paid in full at closing.

1.7 After payment of the broker's commission, real property taxes and KeyBank's lien, the proposed sale will result in a partial payment to SBA and no payment to Oregon Business Development Commission, Cascadia Metals, Inc. or IRS.

1.8 KeyBank does not object to payment of a 4 % commission to the broker at closing.

1           1.9     KeyBank does not object to the proposed lease between the Buyer and the  
2 debtor, but recommends that approval of such lease be postponed until the confirmation hearing  
3 to avoid a possible administrative claim for damages in the event the debtor's third amended  
4 plan is not confirmed.

## II. ARGUMENT

*The Court Should Authorize the Sale Free and Clear of Liens Under § 363(f)(5)*

7           2.1     Bankruptcy Code § 363(f). Section 363(f) sets forth several grounds under  
8 which a “free and clear” sale order may be entered:

- (1) Applicable nonbankruptcy law permits such sale;
- (2) The entity with an interest in the property consents to the sale;
- (3) The value of the property is greater than the amount secured by all liens against the property;
- (4) The lien is in bona fide dispute; or
- (5) The secured creditor could be compelled in a legal or equitable proceeding to accept a money satisfaction of its interest in the property.

16 11 U.S.C. § 363(f).

17 In this case, it is not presently known whether all lienholders will consent to the proposed  
18 sale. It is clear that the value of the Subject Property is substantially less than the aggregate liens  
19 and lienholders junior to KeyBank will either receive only partial payment (SBA) or no payment  
20 at all (Oregon Business Development, Cascadia Metals, IRS) from the proceeds. None of these  
21 liens appear to be in bona fide dispute, and neither the debtor nor the Buyer has identified any  
22 “applicable nonbankruptcy law” that permits such a sale. Therefore, absent consent by all  
23 lienholders, the court may approve the sale only if it satisfies § 363(f)(5).

24           2.2    Legislative History of § 363(f)(5). The legislative history of § 363(f)(5) is  
25 sparse. See S. Rep. No. 95-989, 95<sup>th</sup> Cong., 2d Sess. 56 (1978), *reprinted in* 1978 U.S. Code  
26 Cong. & Admin. News, p. 5843 (“The trustee may sell free and clear if . . . the other entity

1 could be compelled to accept a money satisfaction of the interest in a legal or equitable  
2 proceeding.”); H.R. Rep. No. 95-595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 345 (1977), *reprinted in* 1978 U.S.  
3 Code Cong. & Admin. News, pp. 6301-02 (same).

4       2.3     Pre-Code Practice. The Bankruptcy Code should not be construed to effect a  
5 change in pre-Code practice in the absence of at least some discussion in the legislative history.  
6 *See Midlantic Nat’l Bank v. New jersey Dept. of Environmental Protection*, 474 U.S. 494, 501  
7 (1986) (“If Congress intends for legislation to change the interpretation of a judicially created  
8 concept, it makes that intent specific”); *In re Bonner Mall Partnership*, 2 F. 3d 899, 913 (9thCir.  
9 1993) (“Where the text of the Code does not unambiguously abrogate pre-code practice, courts  
10 should presume that Congress intended it to continue unless the legislative history dictates a  
11 contrary result.”), *cert. granted*, 510 U.S. 1039, 114 S.Ct. 681, (1994), appeal dismissed as moot,  
12 [513 U.S. 18](#), 115 S.Ct. (1994).

13       Short sales were permitted prior to the enactment of § 363(f). In *Van Huffel v.*  
14 *Harkelrode*, 284 U.S. 225 (1931), the bankruptcy court authorized the sale of real property free  
15 and clear of liens with liens to attach to the proceeds of the sale. The property was subject to  
16 two mortgages and a lien for property taxes. All of the proceeds were applied to the satisfaction  
17 of the first priority mortgage. The county treasurer contended the bankruptcy court lacked  
18 power to sell the property free from the tax lien. The United States Supreme Court held that,  
19 even though the 1898 Bankruptcy Act did not contain a provision expressly allowing sales free  
20 and clear of liens, bankruptcy courts have inherent power to allow free and clear sales. *Id.* at  
21 227 (“We think it clear that the power was granted by implication. Like power had long been  
22 exercised by federal courts witting in equity when ordering sales by receivers or on  
23 foreclosure”).

24       The lien at issue in *Van Huffel*, like the junior liens of Oregon Business Development  
25 Commission, Cascadia Metals, Inc. and the IRS in this case, was “out of the money”. Nothing  
26 in the language or legislative history of § 363(f)(5) suggests that the drafters intended for the

1 provision to be interpreted narrowly. On the contrary, it appears that the statute was worded  
2 broadly to permit free and clear sales under a variety of circumstances. Therefore, consistent  
3 with pre-Code practice, § 363(f)(5) should be interpreted to permit the short sale in this case.

4       2.4     Clear Channel. In *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391  
5 B.R. 25 (BAP 9<sup>th</sup> Cir. 2008) (“*Clear Channel*”), the Ninth Circuit BAP analyzed § 363(f)(5).  
6 The lower court had glossed over this provision, reasoning that “all liens, by definition, are  
7 capable of being satisfied by money.” The BAP held that this was error, because the proper  
8 focus of § 363(f)(5) is “whether there is an available type or form of *legal or equitable*  
9 *proceeding* in which a court could compel Clear Channel to release its lien for payment of an  
10 amount that was less than the full value of Clear Channel’s claim.”

11       The BAP held that “the bankruptcy court must make a finding of the existence of such a  
12 mechanism and the trustee must demonstrate how satisfaction of the lien could be compelled.”  
13 The BAP remanded the case to the bankruptcy court to “allow the parties to attempt to identify a  
14 qualifying proceeding under nonbankruptcy law (if one exists) that would enable them to strip  
15 Clear Channel’s lien and make the sale of [the debtor’s property] free and clear under §  
16 363(f)(5).”

17       Courts following *Clear Channel* require proof of a “qualifying proceeding under  
18 nonbankruptcy law” in which a junior lienholder could be compelled to release its lien. Thus, in  
19 *In re Jolan, Inc.*, 403 B.R. 866, 869 (Bankr. W.D. Wash. 2009), the bankruptcy court authorized  
20 a short sale of personal property under § 363(f)(5) because Washington’s Uniform Commercial  
21 Code and receivership statute were “qualifying proceedings” that allowed such property to be  
22 sold free and clear of liens, including first priority liens.

23       It should be noted that the qualifying proceeding under § 363(f)(5) need only be a  
24 *hypothetical* proceeding, not an *actual* proceeding:

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1 It is important to focus on the hypothetical nature of [the] language of §  
2 363(f)(5). . . . There is no requirement that the legal or equitable  
3 proceeding compelling the acceptance of less than full value actually  
4 occur prior to the § 363(f)(5) sale, or if at all. Furthermore, if the “legal or  
5 equitable proceeding” contemplated by § 363(f)(5) would result in the  
junior lienholder receiving nothing, then a § 363(f)(5) sale that pays them  
nothing or gives them an unsecured claim to be redeemed for some dollar  
amount would appear to be permissible.

6 *In re Levitt & Sons, LLC*, 384 B.R. 630, 648 (Bankr. S.D. Fla. 2008).

7 2.5 Qualifying Proceedings in this Case. Applying *Clear Channel* to the present  
8 case, the Subject Property may be sold free and clear of SBA’s, Oregon Business Development  
9 Commission’s, Cascadia Metals, Inc.’s and IRS’s lien if there exists a legal or equitable  
10 proceeding in which these junior lienholders could be compelled to release their lien.

11 There are at least four such “qualifying proceedings”:

- 12 (1) A receivership under federal law;
- 13 (2) A nonjudicial foreclosure proceeding under Oregon law;
- 14 (3) An eminent domain proceeding under federal law; and
- 15 (4) An eminent domain proceeding under Oregon law.

16 2.5.1 Federal Receivership. Federal district courts have inherent equitable  
17 power to appoint receivers. 1 CLARK ON RECEIVERS § 46(a), at 49 (3<sup>rd</sup> ed. 1959). Federal  
18 courts have “broad powers and wide discretion to determine the appropriate relief in an equity  
19 receivership.” *S.E.C. v. American Capital Investments, Inc.*, 98 F. 3d 1133, 1144 (9th Cir.  
20 1996), *cert. denied*, 520 U.S. 1185, 117 S.Ct. 1468 (1997) (quoting *S.E.C. v. Lincoln Thrift*  
21 *Ass’n*, 577 F. 2d 600, 606 (9th Cir. 1978)).

22 It has long been recognized that a federal court presiding over a receivership may  
23 authorize the sale of assets free and clear of liens and encumbrances. “A court of equity, under  
24 proper circumstances, has the power to order a receiver to sell property free and clear of all  
25 encumbrances.” *Miners Bank of Wilkes-Barre v. Acker*, 66 F. 2d 850,853 (2d Cir. 1933).

1 Therefore, a federal receivership is a “qualifying proceeding” for purposes of §  
2 363(f)(5).

3 2.5.2 Nonjudicial Foreclosure Sale Under Oregon Law. Oregon’s trust deed act  
4 allows lenders to foreclose a mortgage or deed of trust privately, under power of sale, instead of  
5 filing a lawsuit. ORS 86.705-795. A nonjudicial foreclosure sale, or trustee’s sale, is the private  
6 sale of secured property pursuant to a power of sale contained in the mortgage or deed of trust.  
7 ORS 86.710. The power of sale gives the lender the right to sell the property at auction without  
8 court supervision. ORS 86.735(4).

9 Under Oregon law, after a borrower defaults on the loan, the lender’s initial step in the  
10 foreclosure process is to serve a Notice of Default. ORS 86.735(4). If the borrower fails to cure  
11 the default, the lender may issue a Notice of Sale. ORS 86.745-750. If the borrower still fails to  
12 cure the default and does not successfully undertake legal action to halt the sale, then the trustee  
13 will sell the property to the highest bidder at a public sale. ORS 86.755(1).

14 The sale forecloses and terminates the owner’s interest and the interests of holders of  
15 junior liens. ORS 86.770(1).

16 In the event the proceeds exceed the sale expenses, after payment of the obligation  
17 secured by the deed of trust any remaining proceeds are distributed to “all persons having  
18 recorded liens subsequent to the interest of the trustee in the trust deed as their interests may  
19 appear in the order of their priority.” ORS 86.765(3).

20 In a trust deed foreclosure scenario, a junior lienholder, such as SBA, Oregon Business  
21 Development, Commission, Cascadia Metals, Inc. or IRS, would be entitled to receive excess  
22 proceeds, after payment of sale expenses and the senior lien of KeyBank, and therefore “could be  
23 compelled . . . to accept a money satisfaction” of its lien.<sup>1</sup>

24 <sup>1</sup> “Money satisfaction” as used in § 363(f)(5), does not mean “full money satisfaction.”  
25 *Levitt, & Sons*, 384 B.R. at 648 (citing *In re Grand Slam USA, Inc.*, 178 B.R. 460, 461-62 (E.D.  
26 *Mich* 1995), and *In re Healthco Int’l, Inc.*, 174 B.R. 174 (Bankr. D. Mass. 1994)). *See also, In*  
*re WPRV-TV, Inc.*, 143 B.R. 315, 321 (Bankr. D. P.R. 1991), *vacated on other grounds*, 165 B.R.  
1 (D. P.R. 1992), *rev’d on other grounds*, 983 F. 2d 336 (1<sup>st</sup> Cir. 1993).

1 Therefore, a nonjudicial foreclosure is a “qualifying proceeding” for purposes of §  
2 363(f)(5).

3 2.5.3 Eminent Domain Under Federal Law. Eminent domain is the power of the  
4 sovereign to take private property for public use without the owner’s consent. *United States v.*  
5 *0.95 Acres of Land*, 994 F. 2d 696, 698 (9th Cir. 1993). Eminent domain allows a state or federal  
6 government to reduce *every property interest* to money. *See United States v. General Motors*  
7 *Corporation*, 323 U.S. 373, 377, 65 S.Ct. 357 (1945) (“the constitutional provision [i.e., the  
8 takings clause] is addressed to every sort of interest the citizen may possess”).

9 “The Fifth Amendment requires that the United States pay ‘just compensation’—normally  
10 measured by fair market value—whenever it takes private property for public use.” *United*  
11 *States v. 50 Acres of Land*, 469 U.S. 24, 25026 (1984). *See also, United States v. 760.807 Acres*  
12 *of Land*, 731 F. 2d 1443, 1446 (9th Cir. 1984) (“Just compensation means the monetary  
13 equivalent of the property taken, and the federal courts have employed the concept of ‘fair  
14 market value’ to determine the condemnee’s loss.”).

15 When the government exercises its power of eminent domain, it compensates the people  
16 who have possessory interests in the condemned property. *United States v. 1.377 Acres of Land*,  
17 352 F. 3d 1259, 1269 (9th Cir. 2003). Once the government provides just compensation, its role  
18 is at an end and the apportionment of the condemnation award is left to either the discretion of  
19 the court, or the allocation agreed upon by the parties in a contract. *Id.*

20 In *United States v. 99.66 Acres of Land*, 970 F. 2d 651 (9th Cir. 1992), the Ninth Circuit  
21 described a lienholder’s rights in a condemnation case:

22 Nevertheless, lienholders enjoy certain rights related to the condemnation  
23 award. The award stands in place of the land. As such, valid liens on the  
24 land attach to the award and a lienholder may proceed in equity against the  
compensation award.

25 *Id.* at 659 (citations omitted).



1           If the fair market value of the condemned property, and hence the condemnation award,  
2 is less than the face value of all the liens on the property, junior liens, such as the liens of SBA,  
3 Oregon Business Development Commission, Cascadia Metals, Inc. and IRS in this case, will  
4 nonetheless be extinguished even though the junior liens are not paid in full from the  
5 condemnation award.

6           Therefore, an eminent domain proceeding under federal law is a “qualifying proceeding”  
7 for purposes of § 363(f)(5).

8                   2.5.4 Eminent Domain Under Oregon Law. An eminent domain proceeding  
9 under Oregon law is also “qualifying proceeding” for purposes of § 363(f)(5) of the Bankruptcy  
10 Code. Under Oregon law, as under federal law, the government can take private property for  
11 public use through the power of eminent domain. *Simpson Timber Company v. Dept. of*  
12 *Revenue*, 953 P. 2d 366, 369 n. 4 (Or. 1998). Under Article I, Section 18, of the Oregon  
13 Constitution, property owners are entitled to “just compensation” for the taking of their property.  
14 *Odor v. Hughes*, 986 P. 2d 700, 703 (Or. App. 1999).

15           Since the government is permitted to take property by providing “just compensation,”  
16 i.e., fair market value, it follows that where, as here, the fair market value is less than the total  
17 amount of all liens, a wholly unsecured, or “out of the money” lienholder, such as Oregon  
18 Business Development Commission, Cascadia Metals, Inc., and IRS, will not share in the  
19 apportionment of the condemnation award.

20           Therefore, an Oregon eminent domain proceeding is “qualifying proceeding” for  
21 purposes of § 363(f)(5).

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1 **III. CONCLUSION**

2 WHEREFORE, KeyBank respectfully requests that the Court enter an order authorizing  
3 the debtor in possession to sell the Real Property to R & R Holdings, Inc. free and clear of liens,  
4 with liens to attach to the proceeds of the sale.

5 Dated this 15<sup>th</sup> day of October, 2015.

6 SCHWABE, WILLIAMSON & WYATT, P.C.

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8 By: /s/ Craig G. Russillo  
9 Craig G. Russillo, OSB #973875  
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Admitted *pro hac vice*

14 Attorneys for KeyBank  
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 15<sup>th</sup> day of October, 2015, I caused to be served the foregoing

3 **KEYBANK'S MEMORANDUM IN SUPPORT OF JOINT MOTION TO SELL REAL**

4 **PROPERTY**, via ECF on:

- 5 • JOHN D ALBERT darlene@shermlaw.com, beth@shermlaw.com  
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• CAROLYN G WADE carolyn.g.wade@doj.state.or.us

17 And via first class mail, postage pre-paid to:

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24 /s/ Craig G. Russillo  
25 Craig G. Russillo, OSB No. 973875  
26